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No. 98-740

In the Supreme Court of the United States

OCTOBER TERM, 1998

NEC CORPORATION and HNSX SUPERCOMPUTERS, INC.,
Petitioners,

v.

UNITED STATES and DEPARTMENT OF COMMERCE
and
CRAY RESEARCH, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RESPONDENT CRAY RESEARCH, INC. IN OPPOSITION

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January 6, 1999

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Federal Circuit acted correctly when it followed existing Supreme Court precedent and held that a plaintiff alleging prejudgment by an administrative decisionmaker, based on actions taken by the decisionmaker's agency in the performance of its statutory duties, must prove that the decisionmaker is "not capable of judging a particular controversy fairly on the basis of its own circumstances."

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of this Court, Cray Research, Inc. provides as follows:

1. Cray Research, Inc. is a wholly owned subsidiary of Silicon Graphics, Inc.

2. Cray Research, Inc. does not have any non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

RULE 29.6 LISTING ii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 2

A. General Background 2

B. The Statutory Basis for the Department's Actions 4

C. The Decisionmaker's Involvement in the Actions of Which NEC Complains 8

D. The Decision of the Court of Appeals 11

REASONS FOR DENYING THE WRIT 13

I. THIS COURT HAS PREVIOUSLY ADDRESSED THE CONSTITUTIONAL ISSUE AS TO WHICH NEC SEEKS CERTIORARI, AND THE COURT BELOW FOLLOWED THIS COURT'S GUIDANCE 14

II. THERE IS NO CONFLICT AMONG THE CIRCUITS 20

TABLE OF CONTENTS -- continued

III. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO GRANT CERTIORARI 23

CONCLUSION 25

APPENDIX A 1a

APPENDIX B 3a

TABLE OF AUTHORITIES

Page

Cases:

American Cyanamid Co. v. Federal Trade Comm'n, 363 F.2d 757 (6th Cir. 1966) 21, 22
Antoniu v. Securities and Exch. Comm'n, 877 F.2d 721 (8th Cir. 1989) 21, 22
Cinderella Career & Finishing Sch., Inc. v. Federal Trade Comm'n, 425 F.2d 583 (D.C. Cir. 1970) 21, 22
Federal Trade Comm'n v. Cement Institute, 333 U.S. 683 (1948) ..... *passim*
Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976) ..... *passim*
Staton v. Mayes, 552 F.2d 908 (10th Cir. 1977) .. 21, 22
Texaco, Inc. v. Federal Trade Comm'n, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965) 21, 22
United States v. Morgan, 313 U.S. 409 (1941) . 12, 18, 21
Withrow v. Larkin, 421 U.S. 35 (1975) ..... *passim*

Statutes:

19 U.S.C. § 1673a ..... *passim*
19 U.S.C. § 1677 2
19 U.S.C. § 1677a 2
19 U.S.C. § 1677b 2
19 U.S.C. § 1677e 2
19 U.S.C. § 1677m 2

TABLE OF AUTHORITIES -- continued

Miscellaneous:

Inter-Departmental Disclosure of Information Submitted Under the Shipping Act of 1984, 9 Op. Off. Legal Counsel 48 (Feb. 8, 1985) 8

2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.8 (3d ed. 1994) . 20

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BRIEF OF RESPONDENT CRAY RESEARCH, INC. IN OPPOSITION

Respondent Cray Research, Inc. ("Cray") respectfully requests that this Court deny the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Federal Circuit entered on August 7, 1998.

COUNTERSTATEMENT OF THE CASE

A. General Background

On July 29, 1996, respondent Cray Research, Inc. ("Cray") filed a petition with the Department of Commerce ("the Department") under Title VII of the Trade Act of 1930, as amended, 19 U.S.C. §§ 1673 *et seq.* ("the Act"), asking the Department to initiate a formal on-the-record antidumping proceeding (often referred to as an "investigation") and to impose antidumping duties on the sales of vector supercomputers by the petitioners here, NEC Corporation and HNSX Supercomputers, Inc. (collectively, "NEC").[1] The Department commenced a formal antidumping proceeding.

Under the Act, a foreign producer such as NEC has the right to submit its actual cost and pricing data on the record of the proceeding, and the Department must then base its analysis in the proceeding on those data unless they are incomplete, unverifiable, or unrepresentative. 19 U.S.C. §§ 1677a, 1677b(a)(1)(B), (f), 1677m(d), (e), (i). Where a party withholds information that the Department has requested, the Department "shall . . . use the facts otherwise available in reaching" its dumping determination in the proceeding. *Id.* § 1677e(a). In such a situation, the Department "may use an inference that is adverse to the interests of [the non-cooperating] party in selecting from among the facts otherwise available." *Id.* § 1677e(b).

Notwithstanding these provisions, NEC chose not to participate in or cooperate with the Department's antidumping proceeding. NEC refused to respond to the questionnaire that the Department, following its standard procedures, sent to

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[1] "Dumping" occurs when foreign merchandise is being sold, or is likely to be sold, in the United States at less than its "fair value." 19 U.S.C. § 1677(34).

NEC; nor did NEC submit any other data or information. Pet. 31a, 56a-57a.[2]

Instead, NEC filed an action in the Court of International Trade ("the CIT") seeking to enjoin the antidumping proceeding on the ground that the Department had prejudged the matter as a result of an analysis the Department had performed, at its own initiative and before Cray had filed the antidumping petition, into the possibility that NEC was engaged in dumping. After allowing NEC to take discovery and holding an evidentiary hearing, the CIT denied NEC's motion for a preliminary injunction. After allowing additional discovery and holding a further evidentiary hearing, the CIT concluded that NEC had failed to prove prejudgment and denied NEC's application for a permanent injunction. Pet. 33a-76a. A unanimous panel of the U.S. Court of Appeals for the Federal Circuit affirmed. Pet. 1a-32a.

NEC now petitions this Court for a writ of certiorari to review the decision of the Federal Circuit, claiming that the Federal Circuit applied the wrong legal standard. The Petition rests on three basic premises each of which is unsupported by, and mischaracterizes, the record. *First*, the Petition incorrectly asserts that the actions of the Department that NEC claims show prejudgment occurred "wholly outside the context of any proceeding authorized by the antidumping laws." Pet. 2.[3] *Second*, the Petition incorrectly conflates actions by

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[2] "Pet." followed by a number refers to the page number of NEC's Petition for a Writ of Certiorari. "Pet." followed by a number and the letter "a" refers to the page number of the Appendix to the Petition. "Opp." followed by a number and the letter "a" refers to the page number of the Appendix to this Opposition.

[3] *See also, e.g.*, Pet. 5-6 (actions complained of were "entirely extraneous to any proceeding, formal or informal, contemplated by the (continued...)

other officials of the Department with actions by the decision-maker in this case. *Third*, the Petition incorrectly characterizes the holding of the court of appeals in this case. This counterstatement of the case discusses these three points.

B. The Statutory Basis for the Department's Actions

This case involves the Department's exercise of its broad powers and duties, pursuant to the Act, to administer the antidumping laws of the United States. The Act authorizes the Department to institute a formal antidumping proceeding based on information submitted to it in an antidumping petition filed by a United States manufacturer. 19 U.S.C. § 1673a(b)(1). That was the authority under which the Department entertained Cray's petition.

In addition, the Act authorizes -- indeed, requires -- the Department to examine potential dumping situations that come to its attention independently of any antidumping petition in order to determine whether to "self-initiate" a formal antidumping proceeding (*i.e.*, to hold an antidumping proceeding on its own initiative). In this regard, the Act states:

> An antidumping duty investigation *shall* be initiated *whenever the [Department] determines, from information available to it,* that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 1673 of this title exist.

19 U.S.C. § 1673a(a)(1) (emphasis added).

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[3] (...continued)
antidumping laws"), 11 (actions "were not made in the course of discharging DOC's duty under the antidumping statute").

This case arose from the Department's consideration, pursuant to 19 U.S.C. § 1673a(a)(1), of a potential dumping situation involving NEC that came to the Department's attention in the absence of an antidumping petition by a domestic manufacturer, and that the Department examined for the purpose of determining whether to self-initiate an antidumping proceeding against NEC.

In March 1995, the University Corporation for Atmospheric Research ("UCAR") issued a Request for Proposals for a new supercomputer system for the National Center for Atmospheric Research ("NCAR"). Three companies submitted "best and final offers": Federal Computing Corporation ("FCC"), Fujitsu Limited, and Cray. FCC and Fujitsu proposed to supply Japanese supercomputers: Fujitsu offered its own products, and FCC offered supercomputers made by NEC. Pet. 3a, 44a. On May 20, 1996, UCAR announced that it would negotiate a contract for the NEC supercomputers. Pet. 5a, 49a.

The National Science Foundation ("NSF") was to finance the UCAR purchase and had to approve it. Pet. 3a, 44a. Both NSF and UCAR were concerned about the possibility that NEC's bid might involve dumping. Accordingly, UCAR engaged a consultant to examine NEC's costs relative to NEC's bid price. Pet. 4a, 44a. The consultant delivered his analysis to UCAR on March 12, 1996.[4]

In April 1996, the Department of Commerce became aware of the concerns of NSF and UCAR that NEC's bid might involve dumping. Pursuant to its statutory power and

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[4] The consultant, Dr. Lloyd Thorndyke, did not find dumping, but -- as he himself noted -- his analysis omitted key cost elements (*e.g.*, hardware and software development costs). Pet. 4a. Cray reviewed his study and concluded that, corrected for the omissions, it showed NEC's price to be substantially below cost. Cray's analysis was part of the record below.

duty to consider "information available to it" under 19 U.S.C. § 1673a(a)(1), the Department, on its own initiative, undertook a preliminary consideration of NEC's bid. Pet. 45a.

NEC's claim that the Department prejudged the merits of the formal antidumping proceeding subsequently initiated pursuant to Cray's petition rests on the Department's actions in connection with its consideration of whether to "self-initiate" a formal antidumping investigation pursuant to 19 U.S.C. § 1673a(a)(1). The actions of the Department upon which NEC's claim of prejudgment rests are identified at pages 3-5 of the Petition. They are as follows:

- *April 24, 1996 interagency meeting convened by Susan Esserman, Assistant Secretary of Commerce for Import Administration.* The court of appeals and the CIT both concluded that this meeting was held in order "to obtain technical information on supercomputers and hear a presentation by NSF on the UCAR procurement." Pet. 4a, 45a.

- *May 13, 1996 interagency meeting convened by Ms. Esserman.* The meeting was held "with senior officials of NSF and other agencies to discuss the results of Commerce's preliminary analysis." Pet. 4a. The CIT heard the testimony of attendees at this meeting, including Ms. Esserman and the General Counsel of NSF, Lawrence Rudolph, and made detailed findings about the meeting. Pet. 72a-74a. Crediting the testimony, the CIT found that Ms. Esserman "was providing advice in the nature of a forecast rather than prejudging the outcome of the investigation." Pet. 74a. The court of appeals upheld the CIT's finding. Pet. 28a.

- *May 17, 1996 interagency meeting at the White House*. Stuart Eizenstat, Under Secretary of Commerce for International Trade, and Ms. Esserman met with officials of the National Economic Council and "provided a short, factual briefing on the UCAR procurement and the [Department's] inquiry." Pet. 4a-5a, 47a.[5]

- *May 20, 1996 letters from Commerce Department to NSF*. Paul Joffe, then Acting Assistant Secretary of Commerce for Import Administration,[6] sent two letters to Dr. Neal Lane, the Director of NSF. Pet. 5a-6a, 49a-51a. One letter informed NSF of Commerce's preliminary view that NEC's bid appeared to involve a very high "dumping margin"[7] and noted that "[a]nti-dumping investigations can be initiated either at the request of the domestic industry or on the initiative of the Department of Commerce." Opp. 1a-2a; *see also* Pet. 5a-6a, 49a. The other letter transmitted Commerce's "Predecisional Memorandum," which contained a "Dumping Analysis," to NSF and authorized NSF to give copies to NEC, UCAR, and NCAR. Opp. 3a-8a; *see also* Pet. 6a, 50a-51a. (The two let-

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[5] In discussing this meeting, NEC asserts that Mr. Eizenstat and Ms. Esserman informed the attendees "of DOC's conclusion that NEC was guilty of dumping." Pet. 4. This characterization is contrary to both the findings of the CIT, Pet. 47a, and the recitation of the court of appeals, Pet. 4a. The assertion that the Department said, at any time, that NEC was "guilty" of anything is utterly unsupported by the record.

[6] Mr. Joffe succeeded Ms. Esserman, who had become Acting General Counsel of the Department, on May 2, 1996.

[7] The "dumping margin" is the amount by which the U.S. selling price would have to be increased to be at "fair value," expressed as a percentage of the U.S. price.

ters are set out in full in the Appendix to this Opposition.)

- *Three meetings with Committees or Members of Congress in June 1996.* On June 6, 10, and 11, 1996, Commerce Department officials met with, respectively, (1) the staff of the House Science Committee, (2) the staffs of the House Ways and Means Committee and the Senate Finance Committee, and (3) Representative David Skaggs, in whose district UCAR is located. In these meetings, the Department representatives explained their predecisional analysis and estimates and the antidumping process. Pet. 7a-8a, 52a-53a.

All of these events occurred in connection with the Department's preliminary assessment of possible dumping pursuant to its self-initiation authority under 19 U.S.C. § 1673a(a)(1).[8] *See* Pet. 45a.

C. The Decisionmaker's Involvement in the Actions of Which NEC Complains

In discussing the various Commerce Department actions just identified, NEC's Petition does not distinguish between those actions in which the decisionmaker in the formal antidumping investigation participated and those in which he did not. In this manner, NEC seeks to attribute to "the decisionmaker" participation in *all* of the actions of which

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[8] While the Act does not expressly authorize the Department to discuss its preliminary analyses of potential dumping situations with other arms of the Government, that authority is implied as part of the "general presumption that information obtained by one federal government agency is to be freely shared among federal government agencies." *Inter-Departmental Disclosure of Information Submitted Under the Shipping Act of 1984*, 9 Op. Off. Legal Counsel 48, 52-53 (Feb. 8, 1985). *See* Pet. 68a-69a n.97.

NEC complains. That is unsupported by, and a distortion of, the record.

The decisionmaker in the formal antidumping proceeding initiated pursuant to Cray's petition was Robert LaRussa, the Acting Assistant Secretary of Commerce for Import Administration. Mr. LaRussa was appointed to that position on June 5, 1996.[9] Pet. 7a, 51a.

Prior to his appointment, Mr. LaRussa had no involvement with the UCAR procurement. Pet. 7a, 51a. He did not attend any of the interagency meetings about which NEC complains; he did not work on the Department's predecisional analysis and estimates; he did not participate in the preparation of the May 20, 1996 letters to NSF; and he did not attend the June 6, 1996 meeting with members of the staff of the House Science Committee. Pet. 51a-52a. Mr. LaRussa's only involvement in the events about which NEC complains was his presence during the June 10, 1996 meeting with staff members of the House Ways and Means Committee, Pet. 52a-53a, and the June 11, 1996 meeting with Representative Skaggs, Pet. 53a. At those meetings, Mr. LaRussa was a largely passive observer: he did not say anything at the June 10, 1996 meeting, and he participated in the June 11, 1996 meeting only in helping to explain the antidumping process to Congressman Skaggs. Pet. 53a.

On the basis of these facts, the CIT found that Mr. LaRussa -- the decisionmaker in the antidumping proceeding initiated by Cray's July 29, 1996 petition -- "had only a cursory involvement with the matters in dispute here" and that Mr. LaRussa's "decisional independence" had not been "con-

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[9] Mr. LaRussa had been preceded in that position by Mr. Joffe, who had in turn been preceded by Ms. Esserman. *See* note 6 *supra*.

strained in a way that precludes a fair investigation." Pet. 68a. *See also* Pet. 74a.

The court of appeals agreed. It stated that, prior to his appointment, "Mr. LaRussa had no involvement with the UCAR procurement," and that, aside from being briefed on the situation generally, he thereafter "had no communication with either Mr. Eizenstat or Ms. Esserman relating to the preparation, dissemination, purpose or content of the Predecisional Memorandum or regarding Cray's petition . . . ." Pet. 7a. The court of appeals stated that "NEC has failed to demonstrate that the decision maker, here Mr. LaRussa, was not capable of judging this particular controversy fairly on the basis of its own circumstances." Pet. 28a.

Although both decisions below thus make clear that the question before them was whether Mr. LaRussa could fairly decide the antidumping proceeding, the Petition barely mentions Mr. LaRussa.[10] Instead, the Petition focuses on events in which Mr. LaRussa did *not* participate, but without acknowledging that he was not a participant. In so doing, the Petition creates the erroneous impression that Mr. LaRussa -- the decisionmaker in the formal antidumping proceeding -- was involved in the actions on which NEC's claim of prejudgment is predicated.

The Petition also fails to point out that the issues that were before Mr. LaRussa in the formal antidumping proceeding differed from the issues the Department had earlier considered in connection with its predecisional inquiry. There were two reasons for the difference. *First*, the purpose of the De-

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[10] The only places where the Petition refers specifically to Mr. LaRussa are at page 5 (noting that he was present at two of the three meetings with Congressional staff) and in footnote 3 on page 9 (noting that the CIT specifically focused on Mr. LaRussa's decisional independence).

partment's predecisional inquiry was to determine whether the Department should exercise its statutory power and discretion to self-initiate an antidumping proceeding of its own, whereas Mr. LaRussa's task was simply to decide the formal on-the-record proceeding before him. *Second*, the formal antidumping proceeding that the Department subsequently initiated pursuant to Cray's petition was on the record, and -- because NEC refused to participate -- the only evidence in the record was the information Cray submitted. That evidence had not been available to the Department when it performed its earlier predecisional analysis, which was based on information that the Department gleaned from NSF and other sources. There is no reason to believe that the Department's analysis of those data would be the same as, or would constrain, Mr. LaRussa's later analysis of different data.

D. The Decision of the Court of Appeals

The part of the decision below that NEC asks this Court to review is the standard that the Federal Circuit applied in determining whether the outcome of the antidumping proceeding had been prejudged. According to NEC, the Federal Circuit applied an "'irrevocably closed mind' standard." Pet. i, 10-11, 18-22. That is, according to NEC the Federal Circuit held that, in order to prevail, "a challenging party [must] show that the decisionmaker's mind is 'irrevocably closed.'" Pet. 10. NEC's argument for a writ of certiorari rests on the premise that the Federal Circuit's decision was based on the application of this standard. In fact, it was not.

NEC and the Government had proposed different standards in the court of appeals. NEC argued that the appropriate standard was

> whether objective facts reveal that the decision maker has in *some measure* prejudged the is-

> sues presented in a subsequent administrative hearing. Under this standard, a prejudgment claim must be sustained if there is even the *appearance* of unfairness.

Pet. 21a (emphasis in original) (citation and internal quotations omitted). Under the Government's proposed standard, the plaintiff would have to show that its "participation in the administrative process would be futile." Pet. 23a-24a (internal quotations omitted).

The Federal Circuit stated that it need not decide between the standards proposed by NEC and the Government, because the Supreme Court had already addressed the issue. Pet. 24a. Following this Court's decision in *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482 (1976), the Federal Circuit held that NEC could prevail only if it could establish that the decisionmaker was "'not "capable of judging a particular controversy fairly on the basis of its own circumstances."'" Pet. 24a (quoting *Hortonville*, 426 U.S. at 493, which in turn quoted *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

The Federal Circuit then applied the *Hortonville* standard to the facts of the case. Pet. 28a-30a. Based on its review of the record evidence, the court concluded that "NEC has failed to demonstrate that the decision maker, here Mr. LaRussa, was not capable of judging this particular controversy fairly on the basis of its own circumstances." Pet. 28a. *See also* Pet. 30a ("NEC has failed to satisfy its burden to prove that Mr. LaRussa was incapable of judging this particular controversy fairly on the basis of its own circumstances."). Just as had the CIT, *see* Pet. 68a, the Federal Circuit emphasized the fact that the decisionmaker, Mr. LaRussa, had virtually no participation in the events that NEC claims evidence prejudgment, Pet. 27a, 30a.

Though it decided the case by applying this Court's *Hortonville* standard, the Federal Circuit did, to be sure, mention the "irrevocably closed mind" concept. Pet. 24a, 29a. It did so, however, by way of giving an illustration of a situation in which the *Hortonville* standard was satisfied. Referring to the *Hortonville* test, the Federal Circuit stated: "This standard is met when the challenger demonstrates, *for example*, that the decision maker's mind is 'irrevocably closed' on a disputed issue."[11] Pet. 24a (emphasis added) (quoting *Federal Trade Comm'n v. Cement Institute*, 333 U.S. 683, 701 (1948)). The Federal Circuit then went on to say that "[t]his standard" -- referring to the *Hortonville* standard -- is the appropriate standard to apply in this case. Pet. 24a. And, as noted above, the Federal Circuit's statement of its conclusion, based on applying the legal standard to the facts of record, incorporated the *Hortonville* standard -- that NEC did not show that Mr. LaRussa was not "capable of judging this particular controversy fairly on the basis of its own circumstances." Pet. 28a, 30a.

REASONS FOR DENYING THE WRIT

Each of the four judges who has heard this case -- the single judge of the CIT and the three judges of the Federal Circuit -- concluded, based on the evidence of record, that Mr. LaRussa, the decisionmaker in the antidumping proceeding that the Department initiated pursuant to Cray's petition, did not prejudge the outcome. Not satisfied, NEC now asks this Court to review the legal standard the Federal Circuit applied in ruling on the prejudgment issue.

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[11] In quoting this sentence, the Petition omitted the words "for example," thereby changing the meaning of the sentence. *Compare* Pet. 19 *with* Pet. 24a.

The Court should not grant certiorari in this case. The Court has several times addressed the precise issue of prejudgment raised by this case, most recently in *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482 (1976), which the Federal Circuit followed. There is no need for this Court to revisit the issue again in this case.

Nor is there a conflict between the Federal Circuit and other circuits with respect to the standard of review. NEC's argument that a conflict exists rests principally on its mischaracterization of this case as one in which an administrative decisionmaker exceeded its authority and acted "outside" the bounds of its statutory power. Pet. 15. But the Department in fact undertook the actions of which NEC complains pursuant to and in connection with its express statutory authority to consider whether to self-initiate a formal antidumping investigation. *See* 19 U.S.C. § 1673a(a)(1); Pet. 45a.

Finally, this case is for other reasons not an appropriate one in which to address the issue as to which NEC seeks certiorari. Most notably, because the decisionmaker, Mr. LaRussa, did not participate in the actions that NEC cites as evidence of prejudgment, the record in this case does not lend itself to an effective analysis of the standard that should apply to potential prejudgment situations.

I. THIS COURT HAS PREVIOUSLY ADDRESSED THE CONSTITUTIONAL ISSUE AS TO WHICH NEC SEEKS CERTIORARI, AND THE COURT BELOW FOLLOWED THIS COURT'S GUIDANCE.

This Court has on several occasions considered claims of unconstitutional prejudgment arising from an administrative decisionmaker's dual statutory roles of initial investigator and

subsequent adjudicator. On each occasion, the Court has emphasized that the standard for finding prejudgment must be high in order to preserve the administrative scheme established by Congress.

In *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), the FTC instituted formal enforcement proceedings against several firms on charges that their pricing systems constituted unfair competition. The firms demanded that the FTC disqualify itself from the proceedings because, before the proceedings were instituted, the FTC had investigated the pricing systems at issue and had reported to Congress and the President on them. *Id.* at 700. The reports indicated that at least some of the FTC members believed that the pricing system was illegal, and this Court assumed, for purposes of discussion, "that such an opinion had been formed by the *entire* membership of the Commission as a result of its prior official investigations." *Id.* (emphasis added). Nevertheless, this Court refused to disqualify the FTC from the subsequent enforcement proceedings. The Court stated that

> the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' [pricing] practices[,]

particularly in light of the firms' right to participate in the formal proceeding in support of their positions. *Id.* at 701. Concluding its discussion, the Court stated that it is not

> a violation of due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the

> same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

Id. at 702-03 (footnote omitted).[12]

This Court addressed the issue again in *Withrow v. Larkin*, 421 U.S. 35 (1975). Emphasizing again that judges commonly preside over the same issues twice -- for example, in deciding preliminary and permanent injunction proceedings -- the Court went on to state:

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

Id. at 56 (footnote omitted). Applying this principle, the Court held that it was not a denial of due process for an administrative agency -- the Wisconsin Medical Examining Board -- first to investigate whether the plaintiff physician had engaged in certain proscribed acts, *id.* at 39, and thereafter to hold a "contested hearing" to decide whether he had engaged in those acts and whether his license should be suspended as a result, *id.* at 40-41. The Court stated that "there was no more

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[12] Here, by contrast, the issues in the Commerce Department's predecisional inquiry and the issues in the antidumping proceeding were not identical. *See* pp. 10-11 *supra*. Consequently, the argument for disqualification is even weaker.

evidence of bias or the risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate." *Id.* at 54 (footnote omitted). To establish bias or prejudgment, a complainant must "overcome a presumption of honesty and integrity in those serving as adjudicators." *Id.* at 47; *see also id.* at 55. That could be done, the Court said, in situations "in which the adjudicator has a pecuniary interest in the outcome" or "in which he has been the target of personal abuse or criticism from the party before him." *Id.* at 47.

This Court addressed the issue most recently in *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482 (1976). In that case, the School Board had negotiated unsuccessfully with teachers for renewal of a collective bargaining contract. When the teachers then went on strike, the School Board held disciplinary hearings and fired them. The teachers sued for violation of due process, claiming the School Board was not an impartial decisionmaker in the disciplinary hearings by virtue of its involvement in the negotiations. This Court rejected the claim, stating that the Board's prior involvement was "not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power." *Id.* at 497. The Court said that a decisionmaker is not disqualified by "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role," *id.* at 493 (citing *Withrow*, 421 U.S. at 47, and *Cement Institute*, 333 U.S. at 700-03), or

> because he has taken a position, even in public, on a policy issue related to the dispute, *in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances.*"

Id. (emphasis added) (quoting *Morgan*, 313 U.S. at 421, and also citing *Cement Institute*, 333 U.S. at 701). There was no such showing in *Hortonville*; as the Court stated, the Board members did not have "the kind of personal or financial stake in the decision that might create a conflict of interest, and there [was] nothing in the record to support charges of personal animosity." *Id.* at 491-92.

In the instant case, the Federal Circuit followed and applied this Court's guidance, citing and discussing *Cement Institute*, *Withrow*, *Hortonville*, and others. Pet. 20a-28a. As noted in the Counterstatement of the Case, pp. 11-13 *supra*, the Federal Circuit decided the case on the basis of the standard this Court enunciated in *Hortonville*, finding that "NEC has failed to demonstrate that the decision maker, here Mr. LaRussa, was not capable of judging this particular controversy fairly on the basis of its own circumstances." Pet. 28a. *See Hortonville*, 426 U.S. at 493.[13]

In an effort to argue that this case warrants certiorari, NEC asserts that this case differs in two respects from the cases in which this Court has previously addressed the issue.

First, NEC states that the prior cases did not involve "allegations of prejudgment based on conduct that fell outside the decisionmaker's legal duties." Pet. 23. NEC claims that, by contrast, its allegation of prejudgment here rests on "highly irregular actions and pronouncements by Commerce that took place entirely *outside* the established statutory and regulatory procedures governing antidumping proceedings . . . ." Pet. 23 (emphasis in original).

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[13] NEC asserts that the Federal Circuit rejected NEC's proposed standard *sub silentio*. Pet. 16. That is not so. The Federal Circuit discussed at length the reasons why it held that NEC's proposed standard was inappropriate, emphasizing in particular that it is inconsistent with the decisions of this Court on the subject. Pet. 21a-28a.

There is no merit to NEC's attempt to distinguish this case from the Court's prior prejudgment cases. Contrary to NEC's characterization, the actions of the Department of Commerce of which NEC complains were within the scope of its duties and responsibilities for administering the antidumping laws. As discussed in the Counterstatement of the Case, pp. 4-8 *supra*, the Department is expressly authorized by statute to examine and assess information available to it from all sources in order to determine whether the Department should self-initiate an antidumping proceeding. 19 U.S.C. § 1673a(a)(1). That was precisely why the Department performed its predecisional analysis and estimate, and why it consulted with other arms of the Federal Government that had an interest in the matter by virtue of their own respective responsibilities.[14]

Second, NEC attempts to distinguish this case from the Court's prior prejudgment cases on the ground that the initial agency inquiry in each of the prior cases had involved "legislative facts" whereas the initial inquiry in this case (*i.e.*, the predecisional analysis and estimate) involved "adjudicative facts." Pet. 19-22. This argument mischaracterizes the Court's prior cases.

This Court's *Cement Institute-Withrow-Hortonville* line of cases embraced situations where the alleged prejudgment arose from initial agency inquiries into adjudicative facts (what NEC calls "particular facts regarding particular parties," Pet. 18) as well as from inquiries into legislative facts (what NEC calls "questions of law and policy," Pet. 19 (emphasis omitted)). While the initial inquiry in *Cement Institute* was

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[14] That the Department's Predecisional Memorandum became publicly available does not, of course, detract from the fact that it was prepared pursuant to the Department's statutory duty to examine potential dumping situations.

indeed legislative in nature, the initial inquiry in *Withrow* was as adjudicative and non-legislative as an inquiry can be: it was an investigation into particular facts regarding particular actions by a particular physician. 421 U.S. at 38-43. And *Hortonville* cited *both* prior cases -- *Withrow* and *Cement Institute* -- for the proposition that "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker." 426 U.S. at 493.[15]

For these reasons, NEC is incorrect in asserting that this case "will afford this Court an opportunity to address [an] important question of Constitutional law which it has not heretofore directly addressed." Pet. 25. The issue as to which NEC seeks certiorari is the same issue that this Court has addressed several times already, and there is no reason to revisit the issue again in this case.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS.

NEC argues that the standard the Federal Circuit applied is in conflict with the standard adopted by the District of Columbia, Sixth, Eighth, and Tenth Circuits for prejudgment cases. NEC's assertion of a conflict rests, however, on two mischaracterizations.

To begin with, NEC has, as discussed earlier, mischaracterized the standard that the Federal Circuit applied in

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[15] NEC's reliance on the "leading authorities on administrative procedure" in support of its adjudicative fact/legislative fact distinction is misplaced. Pet. 21-22. Although the administrative law treatise NEC cites does indeed suggest that cases involving adjudicative facts more frequently warrant a finding of prejudgment on the merits than do cases involving legislative facts, the treatise nowhere suggests that different *standards* should apply to the respective situations. *See generally* 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.8 (3d ed. 1994).

this case. *See* pp. 11-13 *supra*. NEC's argument is premised on the assertion that the Federal Circuit applied a standard under which disqualification requires the challenger to establish that the decisionmaker had an "irrevocably closed mind." Pet. 10-11, 18-19. In fact, the Federal Circuit applied the *Hortonville* standard, which inquires whether the decisionmaker is "'capable of judging a particular controversy fairly on the basis of its own circumstances.'" 426 U.S. at 493 (quoting *Morgan*, 313 U.S. at 421). The Petition conflates the two standards by omitting the words "for example" from the excerpt quoted on page 19. *Compare* Pet. 24a.

Beyond that, NEC's assertion of a conflict among the circuits rests on a mischaracterization of the circumstances of this case. NEC begins by noting -- correctly -- that the cases it cites from other circuits all involve "an act of apparent prejudgment by a decisionmaker acting *outside* the scope of his statutorily mandated duties." Pet. 15 (emphasis added).[16]

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[16] *See, e.g., Texaco, Inc. v. Federal Trade Comm'n*, 336 F.2d 754 (D.C. Cir. 1964) (prejudgment challenge to FTC Commissioner's participation in adjudicatory proceedings against corporation on ground that Commissioner had made a speech and issued a press release opining that the corporation had engaged in illegal behavior), *vacated on other grounds*, 381 U.S. 739 (1965); *Cinderella Career & Finishing Sch., Inc. v. Federal Trade Comm'n*, 425 F.2d 583 (D.C. Cir. 1970) (prejudgment challenge to FTC Chairman's participation in an adjudicatory proceeding against corporation on ground that Chairman had made public statements questioning the ethical propriety of the corporation's advertisements); *American Cyanamid Co. v. Federal Trade Comm'n*, 363 F.2d 757 (6th Cir. 1966) (prejudgment challenge to FTC Commissioner's participation in FTC hearings against company on ground that Commissioner, during previous job as counsel to Senate subcommittee, had drafted report critical of the company); *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977) (prejudgment challenge to school board member's participation in board's decision to dismiss superintendent on ground that board member had campaigned for office on promise to remove superintendent); *Antoniu v. Securities and Exch. Comm'n*, 877 F.2d

(continued...)

NEC then asserts that the "defining elements" of its claim here "are identical to those addressed by the" other circuits, including that the decisionmaker acted "outside the scope of his statutorily mandated duties." Pet. 15.

As discussed above, however, the actions of the Department here were *within* the scope of the Department's duties and responsibilities for administering the antidumping laws. Everything to which NEC points as evidence of prejudgment was done in connection with the Department's assessment of possible dumping pursuant to its self-initiation authority under 19 U.S.C. § 1673a(a)(1) -- an assessment independent of, and based on different information than, the formal antidumping proceeding subsequently initiated pursuant to Cray's petition.

Thus, there is no conflict between the decision of the Federal Circuit in this case and the cases in the other circuits upon which NEC relies. This case involves a situation where an agency acts in two statutorily authorized capacities -- an initial investigative or assessment capacity, and a subsequent adjudicatory capacity. This case therefore falls within the same fact pattern as the *Cement Institute*, *Withrow*, and *Hortonville* line of cases, and the Federal Circuit properly applied the standard that this Court enunciated in *Hortonville*. In the court of appeals cases NEC invokes -- *Texaco*, *Cinderella*, *Cyanamid*, *Staton*, and *Antoniu* -- the conduct on which the claim of prejudgment was predicated was *not* part of the agency's statutorily mandated role, *see* note 16 *supra*, and

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16 (...continued)
721 (8th Cir. 1989) (prejudgment challenge to SEC Commissioner's participation in administrative proceeding against individual on ground that Commissioner had stated in a speech that the individual had been banned from the securities industry, which was the very issue pending before the SEC in the administrative proceeding).

those courts consequently applied a different standard.[17] If there is any question as to whether *those* cases applied the correct prejudgment standard, that question should be resolved in the context of a case that shares that fact pattern. It should not be resolved in this case, which falls squarely within the *Withrow-Hortonville* line of cases and which therefore applied this Court's *Hortonville* standard.

III. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO GRANT CERTIORARI.

Even if the issue presented in this case could be deemed worthy of certiorari in the abstract, the Court nonetheless should deny NEC's petition, because this case does not present an appropriate record on which to decide the issue.

The issue that NEC asks this Court to address involves the standard for disqualifying a decisionmaker for prejudgment based on prior actions and pronouncements *by the decisionmaker* that are *outside* the decisionmaker's statutory duties and responsibilities. *E.g.*, Pet. 25. This is plainly not an appropriate case in which to explore that issue, for two reasons: *first*, because -- as the trial court found and the court of appeals affirmed -- the decisionmaker here, Mr. LaRussa, was *not* a participant in the actions of which NEC complains, *see* pp. 8-11 *supra*; and *second*, because the actions complained of here were *not* outside the Department's statutory duties and responsibilities for administering the antidumping laws, *see* pp. 4-8, 18-19 *supra*. Thus, the record here is not suitable to elucidate the kind of fact pattern that underlies the

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[17] Just as there is no conflict among the circuits, no "due process double standard" exists which could be viewed as discriminatory by the United States's trading partners. *See* Pet. 26-28. As noted above, the Supreme Court has consistently applied one standard to all prejudgment challenges based on an administrative decisionmaker's actions pursuant to its statutory authority.

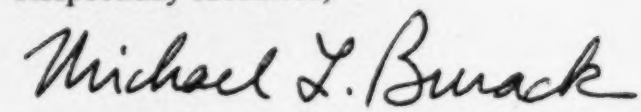
issue NEC seeks to have this Court review. To the contrary, the record here shows that this case falls precisely within this Court's holding in *Hortonville* that "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker." 426 U.S. at 493.

Finally, in determining whether to exercise its discretionary power of certiorari in this case, this Court should keep in mind that NEC chose not to give the Department a chance to demonstrate its fairness and objectivity. NEC refused to participate in or cooperate with the Department's antidumping proceeding; it offered no evidence and presented no arguments. NEC deprived the Department of the evidence NEC possessed, thereby forcing the Department to rely on the uncontradicted evidence presented by Cray in the record of the proceeding. *See* pp. 2-3, 11 *supra*. The resulting scenario was the most unfavorable possible to NEC, and it was the result of NEC's own calculated decision not to cooperate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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January 6, 1999

APPENDIX

APPENDIX A

[SEAL] UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington DC 20230

ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION

May 20, 1996

Dr. Neal Lane
Director
National Science Foundation
4201 Wilson Boulevard
Arlington, VA 22230

Dear Dr. Lane:

The Department of Commerce is responsible for administering the U.S. antidumping law, which guards against unfair international pricing practices that harm U.S. industries. Injurious dumping, which is condemned by the General Agreement on Tariffs and Trade, can have serious adverse consequences for domestic producers and future consumers.

As you requested, we have examined the proposed procurement of a supercomputer system by the National Center for Atmospheric Research (NCAR), which is funded in part by the National Science Foundation and other federal agencies through the University Corporation for Atmospheric Research, to determine if it involves dumping. We have evaluated the NCAR procurement, and have information that we believe is relevant.

Using standard methodology prescribed by the antidumping law, we estimate that the cost of production of one of the foreign bidders is substantially greater than the

funding levels projected by NCAR's request for proposals. In antidumping law terms, this means that the "dumping margin," that is, the amount by which the fair value of the merchandise to be supplied exceeds the export price, is likely to be very high.

We have significant concerns that importation of the NCAR supercomputer system would threaten the U.S. supercomputer industry with material injury within the meaning of the antidumping law, because the imports are likely to have a significant suppressing or depressing effect on domestic prices and because these imports could have a serious adverse impact on the domestic industry's efforts to develop a more advanced version of the supercomputer system to be supplied.

Antidumping investigations can be initiated either at the request of the domestic industry or on the initiative of the Department of Commerce. If the Department finds dumping margins and the U.S. International Trade Commission finds injury, the Department will issue an antidumping order and will instruct the U.S. Customs Service to collect from the importer of the dumped merchandise an antidumping duty in the amount of the dumping margin.

Please let us know if we may answer any questions you may have. I may be reached at (202) 482-1780.

Sincerely,

/s/ Paul L. Joffe
Acting Assistant Secretary
for Import Administration

APPENDIX B

[SEAL] UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington DC 20230

ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION

May 20, 1996

Dr. Neal Lane
Director
National Science Foundation
4201 Wilson Blvd.
Arlington, VA 22230

Dear Dr. Lane:

Attached is a memorandum analyzing dumping margins for a bid of three NEC SX-4 processors leased for five years. The analysis also includes dumping estimates for alternative numbers of units and lease terms. This memorandum was prepared for the official use of the Department of Commerce and the National Science Foundation. We agree that selected distribution to UCAR, NCAR and NEC employees is within our intended official use. These arrangements are in accordance with the conversation this morning between Stephen Powell, our Chief Counsel for Import Administration and Larry Rudolph, your General Counsel.

Sincerely,

/s/ Paul L. Joffe
Acting Assistant Secretary
for Import Administration

Attachment

PREDECISIONAL MEMORANDUM
For Official Use Only

Dumping Analysis
Three SX-4 Processors - Five-Year Lease
(all values are in millions)

This cost model is based on the requirement that the minimum sustained performance of this procurement must increase over time to 50 gigaFLOPS. This would require that NEC provide three SX-4 processors.

Determination of U.S. Price

The U.S. sales price of $ 35.25 million is discounted to a five-year net present value using an interest rate of 4.0%, and assuming that the payment stream will consist of equal monthly payments based on NCAR's projected annual funding.

$ 31.393

Determination of Fair Value

This cost estimate is based on NEC initially providing only an SX-4/16 processor, which later would be upgraded to an SX-4/24, and then a final upgrade to achieve SX-4/32. Each of the other two processors would be installed as an SX-4/32 system. In this way, the minimum performance standards could be met with only three processors.

PREDECISIONAL MEMORANDUM
For Official Use Only

System Materials and Components

October 1996	$ 3.868
October 1997	6.446
October 1998	4.029
Subtotal	14.343

The cost of materials and components includes processors, main and extended memory, mechanical and cooling structures, and interconnection devices. The cost estimate also includes assembly, integration and testing. The cost of follow-on deliveries is reduced to estimate the effects of "Moore's Law," which states that computer performance should double every 18 months or, the same performance could be obtained for half the price.

Storage Systems

October 1996	$ 0.800
October 1997	1.140
October 1998	0.808
Subtotal	2.748

Storage systems are required for each SX-4. This estimate is based on magnetic disk technology. The cost of recording media (disks) is estimated to decline by 50% every 9 months; the cost of the remaining components (approximately 40% of the total) is estimated to decline by 20% per year.

Other Services and Software

October 1996	$ 0.840
October 1997	1.365
October 1998	0.871
Subtotal	3.076

Other services and software includes integration, maintenance, and consulting services. These services are often bundled as a single surcharge at 18% of total hardware costs.

Marketing Costs

The cost of marketing high performance computing products is substantial. Industry standards for this class of machine reveals that marketing costs average 15% of revenues.

$ 5.288

Research and Development

The development cycle for a high-end supercomputer system is four to five years. These costs, also referred to as Nonrecurring Engineering (NRE) expense, include research, design, engineering, simulation, prototyping, development of unique test and integration equipment, and final product testing. Factoring in the cost of money on the estimated $ 200 million in development costs adds $ 17.435 million. This cost is amortized over the 250 processors NEC estimated that it would ship. The per unit NRE expense assumes a scaling factor of

0.666 that reduces the NRE as systems increase to larger sizes like the 32-processor NCAR computer.

	$ 55.608
Total Costs	$ 81.063
Profit	
Profit is based on the 2% earnings before taxes reported on NEC's financial statements.	$ 1.621
Total Fair Value	$ 82.684
Margin Calculation	
(Fair Value - U.S. Price)/(U.S. Price) = Dumping Margin	163.38%

Additional Comments

The estimated dumping margins will vary based on the number of processors included in the lease, the length of the lease, the possible buy-out of NCAR's existing lease, and the estimated number of SX-4 units produced by NEC.

- Under the three-unit, five-year lease scenario, we estimated dumping margins as high as 190%

- Under the four-unit, five-year lease scenario, we estimated dumping margins as high as 280%
- Under the one-unit, three-year lease scenario, we estimated dumping margins as high as 240%